No. 10988

In the United States Circuit Court of Appeals for the Ninth Circuit

DETWEILER BROS., INC., A CORPORATION, APPELLANT

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

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This is an appeal from a final order of the District Court granting an application of the Administrator of the Wage and Hour Division of the Department of Labor to enforce a subpoena duces tecum requiring appellant to produce books, records, papers, and documents described in the subpoena.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. Appellant also relies upon Section 13 (a) (2). These provisions are set forth in the Appendix.

PROCEEDINGS BELOW

Upon the refusal of appellant corporation to permit any inspection of its records by the Wage and Hour Divison, a subpoena duces tecum signed by the Administrator of the Division was duly served on C. H. Detweiler, president of appellant corporation, on July 28, 1944, requiring the appellant to appear before a designated representative of the Division in Twin Falls, Idaho, on August 18, 1944, to produce specified books and papers in a matter "involving an investigation pursuant to the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, of complaints of violations by the said Corporation * * *" (R. 2–8, 20–21, 23–24). The records called for were appellant's wage and hour records for its employees during a particular period, and the books, records, invoices and other documents showing appellant's purchases from and shipments to points outside the State of Idaho, during the same period (R. 23–24).

The issuance of the subpoena duces tecum by the Administrator occurred only after a long period of negotiation between the Wage and Hour Division and the appellant, throughout which the Division sought to inspect appellant's records at its place of business in Twin Falls (Exs. A, B, and D; R. 9–19, 21–22). An inspector first applied for permission to examine the company's records on May 12, 1943, again on May 21, 1943, and subsequently on four occasions between June 7, 1943, and November 23, 1943, pursuant to a letter from appellant's attorney authorizing the Division "to inspect the sales invoices and accounts receivable for a representative period of at least twelve months; also, the entire pay roll record from October 24, 1938, to the present date" (R. 14–15). The

final effort to make the inspection, on a specific appointment made by appellant's president, was likewise fruitless (R. 17, 20).

Following appellant's refusal to comply with the subpoena, the Administrator applied to the district court for an enforcement order. The application (R. 2–8) alleged, on information and belief, that appellant is engaged in the business of buying, manufacturing and selling plumbing, sheet metal and heating supplies and, in connection with its business, is engaged in the production of goods for interstate commerce and in commerce within the meaning of the Act. It alleged also that all the books, papers and documents referred to in the subpoena were "relevant material and appropriate to determine whether respondent has violated * * * the Act and will aid in the enforcement of the provisions of the Act" (R. 7).

In response to an order to show cause why the subpoena should not be enforced (R. 25–27), appellant admitted that it purchases, sells and installs sheet metal and heating supplies, but denied that it is engaged in commerce or the production of goods for commerce (R. 30). Appellant asserted further that its business constitutes a "retail service establishment," and that the plumbing and sheet metal workshops which it admittedly operates at its place of business perform work incidental to retail sales or to "new construction work for retail customers within the State" (R. 30–31). The appended affidavit of appellant's secretary stated that appellant's "sheet metal work is of course fabrication work * * * but [appellant] does work only for installation in specific places and in specific buildings and in connection with its business, principally the installation of furnaces" (R. 36–37). In a supplemental

affidavit appellant admitted that it manufactures insulation material, i. e., that it "purchases diatomaceous earth in Idaho which it mixes by machine with paper, places in sacks" and installs in buildings (R. 39–40). It further admitted that it purchases "a large percentage" of its goods outside the State (R. 40).

The Division's inspector also filed an affidavit in which he stated, on information and belief, that appellant purchases outside the State electrical, plumbing, heating and refrigeration parts and appliances which it installs and services for industrial and commercial firms; that appellant "is engaged in tin and sheet metal work for various types of industries including seed houses, flour mills, and creameries"; that appellant manufactures insulation material, some of which is sold to out-of-State commercial and industrial users; and that appellant manufactures, installs and services plumbing and heating systems for commercial and industrial firms (R. 42–43).

The district court granted the Administrator's application and issued an order requiring respondent to produce the records specified in the subpoena (R. 49–51), stating that "all that is required of the Administrator is to inform the Court, on information and belief that he has reason to believe that the respondent is within the Act" (R. 47), The court said that *Endicott-Johnson Corp.* v. *Perkins*, 317 U. S. 501, "seems to be controlling on this question."

QUESTIONS PRESENTED

1. Whether the district court's order of enforcement of the subpoena duces tecum issued by the Administrator of the Wage and Hour Division was within the statutory authorization conferred by Sections 9 and 11 (a) of the Act.

2. Whether the enforcement of the subpoena would violate rights guaranteed by the Fourth Amendment to the Constitution.

ARGUMENT

Introduction.—Appellant contends (1) that the Administrator must prove that an employer is subject to the Act before he is entitled to judicial enforcement of his subpoena, (2) that the Administrator must at least show that he had reasonable cause to believe that a given business is subject to the Act before he is entitled to inspect its records, and (3) that enforcement of the subpoena would subject it to an illegal search and seizure. Our answers to these contentions are (1) that the decisions of the various Circuit Courts of Appeals which have ruled on the question unanimously hold that the Act authorizes judicial enforcement of a subpoena without a hearing or determination of the issue whether the employer is subject to the Act, (2) that if, as some of the Circuit Courts of Appeals have ruled, it must appear that "reasonable grounds" exist for believing that the employer is subject to the Act, such reasonable grounds sufficiently appear in the instant case, and (3) that the subpoena here is specific and limited to documents clearly relevant to the inquiry and therefore does not violate any Constitutional rights.

I

The district court properly ordered compliance with the Administrator's subpoena without a prior hearing on, or determination of, the issue whether the appellant's business is subject to the Act

Appellant contends that the district court did not have authority to enforce the subpoena unless appellant's business was shown to be subject to the Act (br., pp. 9–10,

12–16). The Administrator's position is that a determination of coverage is not a condition precedent to the judicial enforcement of the subpoena. All the Circuit Courts of Appeals which have ruled upon this question are in agreement that enforcement of the Administrator's subpoenas is not dependent upon a prior hearing on, or determination of, the issue whether the employer is subject to the Act. *Martin Typewriter Co.* v. *Walling*, 135 F. (2d) 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.*, 132 F. (2d) 322 (C. A. A. 2), certiorari denied 319 U. S. 761; *Walling* v. *News Printing Co.*, 148 F. (2d) 57 (C. C. A. 3); *Mississippi Road Supply Co.* v. *Walling*, 136 F. (2d) 391 (C. C. A. 5); *Walling* v. *LaBelle Steamship Co.*, 148 F. (2d) 198 (C. C. A. 6); *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7), certiorari denied 311 U. S. 690; *Walling* v. *Benson*, 137 F. (2d) 501 (C. C. A. 8), certiorari denied 320 U. S. 791; *Oklahoma Press Pub. Co.* v. *Walling*, 147 F. (2d) 658 (C. C. A. 10).[1]

Appellant relies heavily upon the decisions in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. (2d) 596 (C. C. A. 6), and *In re Application of Walling*, 49 F. Supp. 659 (D. N. J.) (br., p. 12), in both of which cases the courts held that the enforcement of the subpoena depended upon a showing that the employer was subject to the Act. However, the second decision was recently

[1] See also *Cudahy Packing Co.* v. *Fleming*, 122 F. (2d) 1005 (C. C. A. 8), reversed 315 U. S. 785, on the ground that the subpoena in that case was not issued by the Administrator; *Cudahy Packing Co. of Louisiana* v. *Fleming*, 119 F. (2d) 209 (C. C. A. 5), reversed on the same ground 315 U. S. 357.

Petitions for certiorari were granted by the Supreme Court in the *News Printing* and *Oklahoma Press* cases, *supra*, apparently on the question of the need of a showing of "probable cause." See *infra* p. 17.

reversed by the Circuit Court of Appeals for the Third Circuit in *Walling* v. *News Printing Co., supra,* and the recent decision of the Sixth Circuit in *Walling* v. *LaBelle Steamship Co., supra,* while it does not expressly overrule the *General Tobacco* decision, clearly abandons the position that a hearing and determination of coverage is a prerequisite to enforcement of a subpoena.[2] There is plainly no conflict among the circuits on this point.

This Court has not yet had occasion to pass on the question of judicial enforcement of a subpoena issued under the Fair Labor Standards Act, but did decide a quite similar issue in the case of *Bowles* v. *Glick Bros. Lumber Co.,* 146 F. (2d) 566, 571 (C. C. A. 9). In denying the motion to suppress certain evidence secured by Office of Price Administration investigators in the course of an inspection, the Court made the following remarks which we think are equally applicable to the investigatory powers conferred by the Fair Labor Standards Act (146 F. (2d) at 571):

> To effect the end desired Congress clothed the Administrator with * * * investigatory powers commensurate with his responsibilities, arming

[2] The *LaBelle* opinion states that the Administrator "is entitled to the desired order without the necessity of an actual showing that the employer proceeded against is clearly within the provisions of the Act" where he has "reasonable grounds to believe that such employer is covered or that such person has information essential to the investigation." 148 F. (2d) at 201. Thus the Sixth Circuit obviously no longer adheres to the position it asserted in *General Tobacco & Grocery Co.* v. *Fleming,* 125 F. (2d) 596, 602, that: "On the issue of fact tendered by appellant's answer, the Administrator must show that appellant is engaged in interstate commerce or in the production of goods for interstate commerce before he will be entitled to the relief prayed for in his application."

> him both with authority to inspect and with the power of subpoena. * * * The existence of probable cause for believing that the Act has been violated is not made a prerequisite to inspection, cf. *Fleming* v. *Montgomery Ward & Co., supra.* * * * There is a presumption of regularity in respect of the proceedings of administrative bodies. Hence it is to be presumed that the Administrator has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent.

Section 11 (a) of the Fair Labor Standards Act authorizes the Administrator to conduct investigations. Section 9 of the Act authorizes the Administrator for the purposes of such investigations to issue subpoenas which the district courts are empowered to enforce. The Act confers upon the Administrator express authority to conduct two distinct types of investigatory proceedings (Sec. 11 (a)). It authorizes the Administrator to "investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to the Act * * *." Such an investigation is for the purpose of gathering statistical data and is not a means of enforcing the Act. Investigations of the second type, like the one involved here, are for the purpose of law enforcement. With respect to the second type, the Administrator is authorized to

> enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate *to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act.* [Italics supplied.]

The Second Circuit in *In re Standard Dredging Corp.*, 44 F. Supp. 601 (S. D. N. Y.), affirmed 132 F. (2d) 322 (C. C. A. 2), certiorari denied 319 U. S. 761, clearly pointed out the purpose and scope of this power:

> The second power is designed to facilitate the enforcement of a law which necessarily requires on [the] part of the government an intimate acquaintance with working conditions, wages and hours of employing in individual establishments. The power granted is as broad as the need. "To determine whether any person has violated any provision of this Act" [it] is no more requisite to know what wages he pays and what hours he keeps than to know whether he is engaged in commerce (p. 602).

To the same effect see *Walling* v. *American Rolbal Corp.*, 135 F. (2d) 1003 (C. C. A. 2).

The administrative determination "whether any person has violated any provision of this Act," contemplated by Section 11 (a), is a necessary prerequisite to a suit by the Administrator for an injunction, authorized by Section 17. The courts have recognized that this determination—and therefore the investigation preceding it—must relate to coverage as well as to underpayment. Both of these are, equally, essential elements of violation. The subpoena here involved properly related to both. Consequently, "to hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act." *Oklahoma Press Pub. Co.* v. *Walling*, 147 F. (2d) 658 at 662.

In *Endicott-Johnson Corp.* v. *Perkins*, 317 U. S. 501, where an administrative officer was authorized to investi-

gate violations which involved both coverage and noncompliance, the Supreme Court held it was error for the district court to condition enforcement of a subpoena upon proof of coverage. The subpoena involved in that case was issued by the Secretary of Labor under the Public Contracts Act [3] (see Secs. 4 and 5), and required the production of pay-roll records of certain employees whom the Secretary allegedly "had reason to believe" were covered by the provisions of the Act. The Supreme Court ruled that the district court had no authority "to condition enforcement of her subpoenas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding" (317 U. S. 509). The Court held that while the scope of the Secretary's investigation necessarily involved an examination of wage underpayment, "of course *another indispensable element of violation is that the underpaid employee be included within the benefits of the Act and contracts. This, too, was a matter under investigation in the administrative proceeding*" (317 U. S. at 508). [Italics supplied.] Pointing out that the district court's ruling "would require the Secretary, in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision," the Court held that "the former would be of dubious propriety, and the latter of doubtful practicality." The Court affirmed the ruling of the Second Circuit which, reversing the district court, held that "the District Court should have enforced the subpoenas, on the pleadings, without taking any testimony whatever" (128 F. (2d) 208, 211).

[3] Act of June 30, 1936, c. 881, 49 Stat. 2036, 41 U. S. C., secs. 35–45.

Although the Public Contracts Act and the Fair Labor Standards Act occupy different areas and contain somewhat different procedural features, both prohibit payment of substandard wages and provide for fundamentally similar investigatory functions in their respective fields of coverage. To determine the existence of violations, the Administrator, like the Secretary of Labor, must investigate coverage as well as under-payments, both elements being as "indispensable" to a finding of violation under the Fair Labor Standards Act as they are to a finding of violation under the Public Contracts. If the Administrator were required to prove that an employer or his employees are subject to the Act as a condition precedent to securing judicial enforcement of his subpoena, it would equally defeat the Congressional plan. We submit that the court below correctly held the *Endicott-Johnson* decision applicable here. The relevance of that decision has been recognized by the Third, Fifth and Eighth Circuits;[4] the First and Second Circuits have properly viewed it as controlling.[5]

The statement of the Seventh Circuit in *National Labor Relations Board* v. *Northern Trust Co.*, 148 F. (2d) 24, which involved a subpoena compliance proceeding

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[4] In *Walling* v. *News Printing Co.*, 481 F. (2d) 57 at 60 the Third Circuit held the *Endicott-Johnson* decision "persuasive in determining the issues presented by the case at bar." And the Eighth Circuit, in *Walling* v. *Benson*, 137 F. (2d) 501 at 504, fn. 2, stated that the Supreme Court's "expressions have been accepted in some of the cases * * * as clearly pointing the way on the question and we think soundly so." And see *Mississippi Road Supply Co.* v. *Walling*, 136 F. (2d) 391, 393 (C. C. A. 5).

[5] *Martin Typewriter Co.* v. *Walling*, 135 F. (2d) 918; *Walling* v. *Standard Dredging Corp.*, 132 F. (2d) 322, certiorari denied 319 U. S. 761.

under the National Labor Relations Act, provides, we think, the appropriate answer to appellant's objections:

> Appellants have made a valiant effort to distinguish Endicott-Johnson Corp *v.* Perkins, 317 U. S. 501, but while they have pointed out certain factual differences, they have failed to demonstrate the inapplicability of the principle therein enunciated [at 27].

While there have been different views expressed regarding the extent to which *Endicott-Johnson Corp.* v. *Perkins* is applicable to the Fair Labor Standards Act, the weight of authority clearly holds that the principles expressed by the Supreme Court are pertinent to the construction of this Act. In any event, all of the Circuit Courts of Appeals are agreed that no trial or determination of coverage is required. The reasoning of the First Circuit, in which the Third Circuit specifically concurred, is that to require such proof would turn an investigatory proceeding "into a lawsuit to decide a question which must be decided by the Administrator in the course of his investigation, and which, if decided wrong, can be corrected later in a proceeding to enforce the orders of the Administrator." [6]

The Fifth Circuit has declared that "convenience in

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[6] *Martin Typewriter Co.* v. *Walling*, 135 F. (2d) 918. See also *Walling* v. *News Printing Co.*, 148 F. (2d) 57 at 60 (C. C. A. 3). To the same effect, see *Walling* v. *LaBelle Steamship Co.*, 148 F. (2d) 198. The Third Circuit, in reversing the district court, also noted that the lower court "did not treat the Administrator's application for the execution of the subpoena as a part of a procedure instituted by the officer charged with the administration of the Act," but erroneously "treated the Administrator's application as if it were a proceeding to impose the strict legal sanctions of Section 16 * * *."

most cases dictates that both 'coverage' and 'violations' be inquired about in a single investigation. * * * and we accordingly hold that in such investigations the investigating authority has generally the right to look first into either question or into both concurrently." *Mississippi Road Supply Co.*, v. *Walling*, 136 F. (2d) 391 at 394.

The decisions stress the preliminary character of the proceedings and the duty of the court to "give full facilitating cooperation to the administrative investigatory function." See *Walling* v. *Benson*, 137 F. (2d) at 505 and *Walling* v. *News Printing Co.*, 148 F. (2d) 57 at 58. "If on the face of things a lawful inquiry is in progress, the court ought to assist it, assuming the inquiring body will confine itself to the lawful functions." *Mississippi Road Supply Co.* v. *Walling*, *supra*, at 394. Because of the "presumption of regularity in respect to the proceedings of administrative bodies * * * it is to be presumed that [an] Administrator has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent." *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. (2d) 566, 571 (C. C. A. 9).

Appellant claims (br., pp. 9, 33–34) not only that the Administrator must show that appellant is engaged in commerce or the production of goods for commerce, but also that the Administrator must affirmatively prove that appellant is not entitled to any of the statutory exemptions. We submit that all of the reasons mentioned above for not requiring the Administrator to establish the applicability of the Act to a respondent in a subpoena enforcement proceeding apply with particular force to claims of exemption.

To require the Administrator to prove that the re-

spondent's employees are not exempt would not merely involve the impracticability and impropriety of turning this preliminary proceeding into a trial of coverage issues. It would also do violence to important and well-settled principles of statutory construction and of pleading and proof. As this Court has observed, "It is elementary, of course, that the Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and the spirit of the exceptions, which are subject to a strict construction." *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101, 106 (C. C. A. 9). Accord: *A. H. Phillips, Inc.* v. *Walling*, 65 S. Ct. 807. A corollary of this principle is that the burden of pleading and proving exemption from a statute of this character is upon the party claiming the exemption. *Schmidtke* v. *Conesa*, 141 F. (2d) 634 (C. C. A. 1); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8); *Stratton* v. *Farmers Produce Co.*, 134 F. (2d) 825, 827 (C. C. A. 8); *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Helliwell* v. *Haberman*, 140 F. (2d) 833 (C. C. A. 2). Thus it has been held that a plaintiff "is certainly not required to negative the exemptions of the statute in order to state a cause of action." *Stratton* v. *Farmers Produce Co.*, *supra*, at 827; *Schmidtke* v. *Conesa*, *supra*, p. 635.

The implication of appellant's contention that the Administrator has the burden of disproving exemptions in a proceeding to enforce the subpoena is therefore contrary to settled principles and unsupported by authority. Indeed, even if appellant claimed only that it is entitled to a hearing on the exemption but is not relieved of the burden of proof, it would nonetheless be objectionable.

The trial of exemption issues before the Administrator has had access to the employer's records would find the Administrator seriously handicapped in attempting to disprove or rebut the evidence advanced by the employer.

The subpoena cases involving exemption claims have consistently upheld the Administrator's right to enforcement without prior hearing or proof with respect to the exemption issue. The subpoenas enforced by the First, Fifth and Tenth Circuits in the *Martin Typewriter Co.*, *Mississippi Road Supply Co.* and *Oklahoma Press Pub. Co.* cases were likewise contested on the ground that an exemption applied—the same retail or service establishment exemption claimed in the instant case. Similarly, the subpoenas in *Walling* v. *LaBelle Steamship Co.* and *Standard Dredging Corp.* v. *Walling* were enforced by the Sixth and Second Circuits respectively, without requiring the Administrator to disprove the claims of the employers that their employees were exempt as seamen. See also *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 at 392 (C. C. A. 7), certiorari denied 311 U. S. 670.

Upon the record before this Court, there is plainly no merit in appellant's assertion (br. pp. 34–45), based solely on its own allegations in its affidavits, that "the weight of authority is clear that an establishment such as appellant's is within the exemption set out" in Section 13 (a) (2) for retail and service establishments. The decisions are in agreement that to determine the applicability of an exemption, the court must have before it all the pertinent facts. See cases cited *supra*, p. 14, and also *Castaing* v. *Puerto Rican American Sugar Refinery*, 145 F. (2d) 403, 405 (C. C. A. 1). Obviously more facts are

required than are available in a preliminary proceeding of this character. The affidavits in the record here are not only insufficient to establish appellant's claim, but they cast considerable doubt upon it. By appellant's own admission (R. 39–40), it engages in the manufacture of insulation material and the fabrication of sheet metal, clearly nonretail activities. And in the light of the Government inspector's affidavit "on information and belief" asserting that appellant serves industrial and commercial users as well as private customers, it appears that appellant's characterization of all its sales as "retail" is at least subject to challenge. Appellant does not specify the exact nature of the alleged "retail sales" of sheet metal, insulation, and plumbing and heating parts. If such sales are to "industrial and commercial users purchasing for a business motive" they are nonretail and Congress did not intend to exempt employers in this category. *Walling* v. *Consumers Co.*, 8 Wage Hour Rept. 351 at 353 (C. C. A. 7, 1945). In *Walling* v. *Roland Electrical Co.*, 146 F. (2d) 745, 748, the Fourth Circuit held that labor performed in installing and repairing electrical wiring and motors for "commerical or industrial concerns, where the cost of the service would not be absorbed by the one to whom they were rendered but would be passed on as a part of the price of the product" was not performed in a retail or service establishment.[7] And see *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. (2d) 863 (C. C. A. 9), certiorari denied 65 S. Ct. 117.

[7] In its brief (p. 36) appellant relies on the district court decision in this case which was reversed by the Fourth Circuit in the opinion discussed above.

II

There was "probable cause" for the issuance of the Administrator's subpoena

Appellant contends (br. p. 16) that the Administrator is at least required to establish "probable cause" for making the investigation. On this issue there is a variation in views expressed by the Circuit Courts of Appeals, and the question is currently pending before the Supreme Court in the cases of *Oklahoma Press Pub. Co.* v. *Walling*, No. 1171, certiorari granted May 21, 1945, and *News Printing Co.* v. *Walling*, No. 1179, certiorari granted May 21, 1945. We believe, however, that this question is of no particular importance in the instant case because, as we shall show, there is a sufficient showing of probable cause here to meet any such requirement.

The First, Second, Third, and Seventh Circuits have held that the Administrator is entitled to an enforcement order upon his application without showing of "probable cause" for making the investigation.[8] As noted above, *supra*, p. 7, this Court has held in a comparable situation involving the power of inspection conferred by the Price Control Act that "the existence of probable cause for believing that the Act has been violated is not made a prerequisite to inspection" and that there is a presumption of regularity of the proceedings of public officers. *Bowles* v *Glick Bros. Lumber Co.*, 146 F. (2d) at 571. While this statement related to the question of compliance rather than coverage, the same principles would appear to be

[8] *Martin Typewriter Co.* v. *Walling, supra; Standard Dredging Corp.* v. *Walling, supra; Walling* v. *News Printing Co., supra,* and *Fleming* v. *Montgomery Ward & Co.*, respectively.

applicable here. Other Circuits, the Eighth, Tenth, and Sixth, while upholding the Administrator's right to judicial enforcement without a determination of actual coverage, require a showing in the district court of "probable cause" or "reasonable ground to believe that [the industry] is subject to the Act." *Walling* v. *Benson*, 137 F. (2d) at 505–506 (C. C. A. 8), certiorari denied 320 U. S. 791. From a practical standpoint, this requirement is apparently satisfied "if the application and accompanying affidavits furnished reasonable grounds for the belief that [respondent] or any of its employees were subject to the Act." *Oklahoma Press Pub. Co.* v. *Walling*, 147 F. (2d) at 662. In *Walling* v. *LaBelle Steamship Co.*, the Sixth Circuit said that the Administrator "is entitled to the desired order without an actual showing that the employer proceeded against is clearly within the provisions of the Act," where he has "reasonable grounds to believe that such employer is covered or that such person has information essential to the investigation." 148 F. (2d) at 201.[9]

While we think that these decisions requiring some showing of "probable cause" place a heavier burden on the Administrator than is warranted, there is a sufficient showing in the instant case to meet the standards prescribed by these cases. Appellant admitted that it pur-

[9] The position of the Fifth Circuit on "probable cause" is not clear since in the *Mississippi Road Supply* case the district court required the parties to submit affidavits as to whether there was probable cause for the investigation and ruled that probable cause was shown. The circuit court held that the district court "had a discretion to abstain from a present, final inquiry" into the questions of coverage and violations and "to assist a full inquiry by the Administrator." 136 F. (2d) at 393. The circuit court also held that the "presumption of regularity" places the burden of showing that the inquiry is unlawful upon the employer.

chases "a large percentage" of its goods outside the state (R. 40) and it is well settled that activities connected with the ordering, handling and unloading of such extra-state merchandise are a part of interstate commerce. *Fleming* v. *Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5), affirmed 317 U. S. 564; *Phillips* v. *Walling*, 144 F. (2d) 102, 104 (C. C. A. 1), affirmed 65 S. Ct. 807; *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 338, 339 (C. C. A. 8). From the affidavit of the Wage and Hour Division's inspector, necessarily made on information and belief, it is reasonable to assume for purposes of this proceeding that appellant also sells in interstate commerce and is engaged in the production of goods for such commerce (R. 42–43). That there are reasonable grounds to believe that appellant is not exempt from the Act likewise appears from the affidavits as well as from the decisions discussed *supra*, p. 15–16. The showings held sufficient in the *Oklahoma Press* and *La-Belle* cases, *supra*, were based upon similar information and indications. As a practical matter, the Administrator before securing the employer's records, is in no position to make more of a showing. The application and affidavits filed in the district court accordingly satisfied the requirement of probable cause since they "furnished reasonable grounds for the belief that [respondent] or any of its employees were subject to the Act." See *Oklahoma Press Pub. Co.* v. *Walling*, *supra*, at p. 662.

To hold that the Administrator is entitled to judicial enforcement without making a showing of coverage does not result in the "subjugation of the judiciary by the executive branch," nor make of the court "a mere rubber stamp," as appellant contends (br. pp. 25, 26, 32). There

are a number of defenses that may appropriately be made to an application for enforcement of an administrative subpoena. The application may properly be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome (*Hale* v. *Henkel*, 201 U. S. 43; *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U. S. 298; *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447); or that the hearing is not of the kind authorized (*Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434); or that the subpoena was not issued by the person solely vested with that power (*Cudahy Packing Co.* v. *Holland*, 315 U. S. 357). No such objections have been raised here.

III

THE SUBPOENA DOES NOT VIOLATE THE FOURTH AMENDMENT

Appellant makes a lengthy argument on the basis of the decision in *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U. S. 298 (br., pp. 20–34). The charge that appellant is being subjected to an unreasonable search and seizure is wholly unfounded. The subpoena is limited to specific books and records showing the wages paid to and hours worked by appellant's employees during a particular period and shipping records and documents showing the source and destination of goods handled by appellant. The information contained in these records is clearly relevant to the determination of whether or not violations exist, a determination which the Administrator is obligated to make as the enforcement officer appointed by Congress. To describe an investigation so circumscribed in character as a "general 'fishing expedition' " (br., p. 21) is a distortion of the facts.

Reliance is placed chiefly upon the case of *Federal Trade Comm.* v. *American Tobacco Co., supra.* But the *American Tobacco* case is plainly inapplicable; subpoenas similar in form and scope to the subpoena here involved have been repeatedly enforced. *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7), certiorari denied 311 U. S. 690; *Walling* v. *Benson*, 137 F. (2d) 501 (C. C. A. 8), certiorari denied 321 U. S. 775. See also the numerous other cases cited at page 6, *supra.* As the Seventh Circuit pointed out in the *Montgomery Ward* case, the vice of the subpoena involved in the *American Tobacco* case was that it was not limited to documents which would have been material or relevant, but extended to substantially all of the respondent's papers: "The [American Tobacco] decision is limited to the proposition that the United States Government may demand only records and papers which are relevant to a lawful inquiry, or stated negatively, the Government may not demand unlimited access to all the corporation records, whether relevant or irrelevant to the subject of inquiry or investigation" (114 F. (2d) at 391). If the demand is reasonably specific and limited to documents relevant to the inquiry then in progress, the requirements of the Fourth Amendment are satisfied. *Penfield Co.* v. *Securities & Exchange Comm.*, 143 F. (2d) 746, 751 (C. C. A. 9), certiorari denied 65 S. Ct. 121 (1944); *Consolidated Mines* v. *Securities & Exchange Comm.*, 97 F. (2d) 704, 707–708 (C. C. A. 9); *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. (2d) 566, 571 (C. C A. 9); *Wilson* v. *United States*, 221 U. S. 361; *Hale* v. *Henkel*, 201 U. S. 43; *Baltimore & Ohio R. R. Co.* v. *Illinois*, 221 U. S. 612; *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447.

The subpoena here involved is well within the rule. Both the administrative demand and the court order were specific and definite and the records required are clearly relevant to the lawful inquiry. It follows that the subpoena does not violate the Fourth Amendment.

CONCLUSION

The decision of the district court enforcing the Administrator's subpoena should be affirmed.

Respectfully submitted.

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APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1941, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether *any* person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

SEC. 13 (a). The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. sec. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

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